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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/995,358	11/26/2001	Jules Zecchino	2870/566	2755

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EXAMINER

FUBARA, BLESSING M

ART UNIT	PAPER NUMBER
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1618

MAIL DATE	DELIVERY MODE
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01/27/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

09/995,358

Applicant(s)

ZECCHINO ET AL.

Examiner

BLESSING M. FUBARA

Art Unit

1618

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 29 December 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Blessing M. Fubara/
Primary Examiner, Art Unit 1618

Continuation of 11. does NOT place the application in condition for allowance because: Applicant has taken issue with the examiner's statement that the response filed 4/13/09 was not an Appeal Brief. That statement was in an attempt by the examiner to make clear the prosecution history. The examiner further thanks the applicant for noting that the examiner also used the term "appellant" on page 6, paragraph 4 of the last office action of 09/01/09. The examiner apologizes to the applicant for that inadvertent use of the term "appellant" even if it was an attempt to be consistent with the applicant in the response of 4/13/09.

Applicant corrects the examiner for saying that "the examiner disagrees that the '186 patent must recognize the problem that needed to be solved," with the correction that "the applicant did not state or suggest that the '186 patent must recognize the problem that needed to be solved, only that it didn't, further bolstering the Applicants' position that the use of one type of gellant, ammonium poly (acryldiemethyltauramide-co-vinylformamide, to stably gel a composition having a pH less than 7 and a significant salt content using less than 1 percent by weight of surfactant." However, the examiner's response was directed to applicant's statement of 4/13/09 on page 9, line 2 and 3 of the remarks that "the reference appears to make no distinction among thickeners and therefore does not recognize or address the problem solved by the present invention." The examiner thanks applicant for supporting the idea that the prior art does not have to recognize the problem that needed to be solved.

Applicant argues that the combined teachings of WO 97/32559 and Clariant or US 6,294,186 "fail to render the present invention obvious because" while the ordinary skilled artisan might have attempted simple substitution of one known gellant for another and expect to obtain predictable gelling of an aqueous phase, the ordinary skilled artisan in the art could not have predicted that the polymeric sulfonic acid gellant could be used at a pH of less than 7 in the presence significant salt and in the presence of less than 1% by weight of surfactant. In response, the examiner disagrees with the applicant and notes that the combined teachings of WO 97/32559 and Clariant or US 6,294,186 render obvious the claimed invention because, WO 97/32559 teaches a composition having pH of 5.5 and 6.5, which is less than 7 and which meets the pH requirement of claim 1, the WO 97/32559 also contain surfactant at amount of 0.05-0.5%, which is less than 1 percent just as required by claim 1, the aqueous also contains salt in the aqueous phase and while when the WO 97/32559 teaches the presence of salt in the aqueous phase with no mention of the %amount (see 1st full paragraph of page 5), the claimed composition contains generic salt that can be any salt, so that sodium chloride at 3% in example 3 may meet the requirement for 1-10% salt in claim 1; also salts of polymer at 0.05-20% (1st full paragraph of page 4) meets or renders obvious the requirement for 1-10% salt (i.e. any salt) in the aqueous phase in claim 1. The ARISTOFLEX AVC is known gellant for aqueous systems according to the Clariant product brochure; and US 6,294,186 specifically recognizes xanthan gum and ARISTOFLEX AVC as gelling agent so that because one gelling agent can be used in place of the other to effect same gelling and thickening effect, the ARISTOFLEX AVC can be used in place of the other gelling/thickening agents for anticipated gelling or thickening of the aqueous phase. Therefore, the composition of WO 97/32559 modified by the use of ARISTOFLEX AVC in place of any of the disclosed gelling/thickening agents is obvious over the claimed composition.

Because a compound and its properties are not separated and same compounds must have the same properties, one skilled in the art would expect at the time the invention was made that the properties of ARISTOFLEX AVC would be the same as the properties of the claimed gellant which is ARISTOFLEX AVC. Therefore, the presence of salts in the composition of Wheeler would not affect the viscosity of the gellant and in this case ARISTOFLEX AVC, same compositions/chemicals/compounds must have the same properties.

While applicant points to US 6,197,318, column 11, line 65 to column 14, line 17, that carboxyvinyl polymers such as Carbopols have poor salt tolerance when incorporated into external composition, the composition of WO 97/32559 have salt and Carbopol (see Example 3) and the reference does not state that the composition is unstable; WO 97/32559 contemplates using mixtures of thickening agents (page 4, line 9); US 6,197,318 also teaches that the carboxyvinyl polymers such as Carbopols are used in combination with polysaccharide xyloglucan and finds that the composition containing the mixture is stable and have excellent tolerance to salts (see column 12, lines 4-11). Therefore, the composition of WO 97/32559 containing salt and carboxyvinyl polymers such as Carbopols is stable and also containing low levels of surfactant is stable because the art did not state that the composition is unstable with the passage of time as described by US 6,197,318. It is noted that the amount of surfactant contemplated for use in the WO 97/32559 art is at 0.05-0.5% or 0.05-0.3% and these amounts are less than about 1% (see page 3, at 4th full paragraph). However, if applicant finds example 3, to contain high levels of surfactant, page 3, 4th full paragraph stipulates the use of 0.05 to 0.5% and also WO 97/32559 disclose the presence of salts in the aqueous phase (page 5, 1st full paragraph).

The statement by the examiner that "WO '559 does not list sodium chloride as a thickening agent" in the office action of 09/01/2009 at page 11, was a response to applicant's statement on page 9, 2nd full paragraph, 5th line from the bottom that "in fact, example 2 in WO'559 employs sodium chloride as a thickening agent rather than the carbopol." The examiner hopes that applicant's remarks filed 4/13/09 at page 9, 2nd full paragraph, 5th line from the bottom may explain and clarify the examiner's point in stating that WO 97/32559 does not list sodium chloride as a gelling agent.

It is also unclear to the examiner at the applicant's displeasure at the examiner's remarks that Wheeler does not teach that salts negatively impacted bi-liquid foams --- that statement was a response to applicant's argument. It is requested of applicant to please point to the section if Wheeler (WO 97/32559) that discloses that salts impacted the bi-liquid foams negatively --- so far applicant has not directed the examiner to the section of Wheeler (WO 97/32559) that teaches against the use of salts in the aqueous phase. The Wheeler (WO 97/32559) reference categorically teaches that salts are present in the aqueous phase (first full paragraph of page 4) and Wheeler (WO 97/32559) specifically also teaches that surfactants in amounts of 0.05 to 5% or 0.05-0.3% is contemplated (page 3, 4th full paragraph). The examiner was responding to applicant's arguments with the statement that applicant is objecting.

While examples 2 and 3 may contain high levels of surfactants, what is taught in the specification is that 0.05 to 5% or 0.05-0.3%

surfactant can be used and that the aqueous phase contains salt. On pages 9 and 10, applicant argues against examples 2 and 3 in support of applicant's position, but it is respectfully noted that a prior art reference is not limited to the examples.

The applicant accuses the examiner of ignoring page 5, line 27 to page 6, line 10, page 3, 4th full paragraph, lines 4 and 5 where Wheeler (WO 97/32559) describes embodiments where the surfactant is present at 4-18% (page 5, line 29) for bath and shower gel, 2-15% for coactive surfactant (page 5, line 30 to page 6, line 1), 0.5- 5% coactive viscosity modifier (page 6, lines 1 and 2), 0.05-5% gelling agent such as Carbomer, cellulose gum and polyol fatty acid ester (page 6, lines 3-5) and 0.05 to 0.5 or 0.3% (page 3, 4th full paragraph, lines 4 and 5). Thus it is clear that in at least one embodiment, the lower limit of 0.05 for the carbomer is less than 1%, which is what the claim requires.

No new declaration under 37 CFR has been recently filed. The declarations by James T. Harrison and Michelle Martha Jacobs filed 11/01/2003 and resubmitted 08/01/08 with the Appeal Brief have been considered in the office action of 09/01/09. The declaration under 37 CFR 1.132 (James T. Harrison) filed 11/1/2003 and re-submitted 08/01/08 is insufficient to overcome the rejection of claims 1, 3, 6-10, 12-15, 18, 19 and 21 based upon Wheeler (WO 97/32559) in view of Clariant product brochure or in view of Beerse et al. (US 6,294,186) as set forth in the last Office action because: the composition tested is not commensurate with the claimed composition comprising 1-10% salt, 0.01-10% ARISTOFLEX AVC and less than 1% surfactant (the composition in the declaration uses 0.08 solids with no mention of what the solids are, 0.02 NaCl). Applicant may claim the composition that is unexpected as per the declaration. The declaration under 37 CFR 1.132 (Michelle Martha Jacobs) filed 1/1/2003 and re-submitted 08/01/08 is insufficient to overcome the rejection of claims 1, 3, 6-10, 12-15, 18, 19 and 21 based upon Wheeler (WO 97/32559) in view of Clariant product brochure or in view of Beerse et al. (US 6,294,186) as set forth in the last Office action because non-of the compositions used is commensurate with the claimed composition comprising 1-10% salt, 0.01-10% ARISTOFLEX AVC and less than 1% surfactant while the declaration uses composition comprising 0.1% and 2% ARISTOFLEX AVC to compare with various gelling agents).

Applicant argues that US '888 which is used in combination with WO 97/32559 and US 6,197,318 fails to recognize the problem being solved. The examiner responds to the above by noting that US '888 was relied upon to provide what is missing in WO 97/32559 in combination with US 6,197,318, which are the limitations of claims 4, 5 and 16; US '888 was not relied upon to provide a recognition of a problem that the instant invention solves--- Respectfully, it is noted that the prior art reference does not have to acknowledge the problem applicant solves. The instant claims are directed to composition, which is rendered obvious according to the rejections on record.

Applicant argues that the 978 fails to cure the deficiencies of WO 97/32559 and US'188. The examiner disagrees with applicant's position because US '978 is not relied upon to provide a recognition in the art of what the claimed composition solves, but US '978 is relied upon for teaching the use of lactic acid and salts found naturally in the skin to maintain proper pH and moisturizing levels in cosmetic compositions. The examiner disagrees with the applicant that the examiner did not respond to the arguments of 4/13/09 because page 20 of the last office action, captioned "Response:" under paragraph 29 shows the response to applicant's arguments.

No claim amendment after final is presented as applicant indicates on page 14 of the remarks filed on 12/29/09 after the Final Rejection of 09/01/2009. Claims 1, 3-10, 12-16, 18, 19 and 21 are rejected according to the rejections of record.